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SCANNED ON 2/13/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN SMITH J.S.C. PART 62

Index Number : 110879/2003

FISK, DONNA S.

VS

CITY OF NEW YORK

Sequence Number : 001

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that ~~this motion~~ defendant's post-trial motion to set aside the portion of the jury's verdict on damages is decided in accordance with the attached memorandum decision.

FOR THE FOLLOWING REASON(S):

FILED

FEB 13 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2-6-08

KAREN SMITH J.S.C.

KAREN SMITH J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 62

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DONNA S. FISK and WILLIAM FISK

Plaintiffs,

Index No. 110879/2003

-against-

Decision and Order

CITY OF NEW YORK

Defendant.

----------X

HON. KAREN S. SMITH

The portion of defendant City of New York's ("City") post trial motion to (1) set aside the jury's verdict on damages is denied, (2) to stay entry of judgment until the collateral source hearing is held, is granted, and (3) for the court to set the interest rate to be applied to the judgment at less than 9%, is denied, for the reasons more fully stated below.

In this negligence action, plaintiffs sued defendant for the injuries plaintiff Donna Fisk incurred when she tripped and fell over the prongs of a forklift which had been placed by the defendant in a manner which denied her egress from the area she was attempting to traverse.

The jury trial in this action was held from October 23 through October 30, 2007. On October 30, 2007 the jury rendered a verdict finding the defendant solely liable for the accident and plaintiffs' injuries, awarding the plaintiffs damages as follows:

$250,000 for past pain and suffering,

$250,000 for future pain and suffering,

$ 18, 000 for past medical expenses, and

$ 45,000 for past loss of consortium.

At the end of the trial, defendant's attorney moved, pursuant to CPLR § 4404(a) to set aside both the liability and damages portion of the verdict arguing that they are against the weight of the evidence, and that the damages portion of the verdict is excessive in that the damages awarded, materially deviates from what would be reasonable compensation for the injuries suffered by the

plaintiff as a result of this accident.[1] The Court denied the defendant's motion as it relates to the liability portion of the verdict but reserved on the question as to whether the damages are excessive. The parties were instructed to submit memoranda of law on this point alone. While defendant's motion appears seek to vacate the liability portion of the verdict, along with the damages portion of the verdict, defendant's papers only address the question of the excessiveness of the damages portion of the award. Defendant also seeks (1) an order setting the interest rate upon entry of judgment at less then 9%, and (2) a stay of entry of judgment until after a decision is rendered on defendant's post-trial motion and a collateral source hearing is held.

Pursuant to CPLR § 4404(a), the standard of review of a post trial motion to set aside the damages portion of the jury's verdict is that the verdict is "contrary to a fair interpretation of the evidence" or "goes against the weight of the evidence". While defendant evokes CPLR §4404(a) as the sole statutory basis for the Court's review of the jury's verdict, when considering an application contending that the damages portion of the jury verdict is excessive, the trial court must be mindful of the fact that the standard of review on appeal is whether the amount of the damages awarded "materially deviated from what would be reasonable compensation" (CPLR §5501[c].)

CPLR § 4404(a), provides that a trial court may order a new trial of a cause of action or severable issue where the verdict is contrary to the weight of the evidence, or "in the interest of justice...." A review of a damage award pursuant to CPLR § 4404(a) thus requires an evidentiary analysis as to whether the amount awarded by the jury is supported by any fair interpretation of the evidence. (*Lolik v. Big V Supermarket, Inc.* 86 NY2d 744,746 [1995]; *Yalcut v. City of New York,* 162 AD2d 185, 186 [1st Dept. 1990]; *Lyerly v. Madison Square Garden*, NYLJ, June 24, 2001 at 21 col 3 [Civ Ct NY County]). Whether the analysis is made pursuant to CPLR § 4404(a) or pursuant to § 5501(c), the "Court's discretionary power to overturn a jury's money verdict is to be exercised sparingly" (*Adams v. Georgian Motel corporation*, 291 AD2d 760 [3rd Dept. 2002]), nor should the trial court use its powers merely to substitute its view of the evidence or to modify the harshness of a verdict with which it disagrees. (*Bako v. Condon*, NYLJ May 22, 2001

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[1] As defendant's motion papers do not claim that the past medical expenses portion of the verdict was unreasonable, Court does not address that issue.

at 18 col. 1 [App Term 1st Dept. 2001]).

The evidence produced at trial regarding plaintiff's injuries, the medical treatment she received for her injuries, the residual effects of the injuries, and the impact of those injuries on the quality of her life, was uncontroverted. Plaintiff, a forty-nine year old woman at the time of the accident (May 16, 2002), who suffered from polio since childhood, fractured her right patella when she tripped and fell over the prongs of a forklift which had been parked in front of an area she was attempting to traverse. At the time of her accident, the polio affected the lower portion of her right leg but had no effect on her patella. Plaintiff had no prior injuries nor subsequent injuries to her right patella as of the date of the trial. At trial she testified she had excruciating pain immediately following her fall and her right knee swelled so badly that the hospital refused to operate until the swelling went down. Notwithstanding the fact that the x-rays taken the day of the accident showed a comminuted fracture of the right patella, plaintiff had to wait five days for the swelling to subside before returning to the hospital. When she returned to the hospital on May 22, 2002, the doctor performed an open reduction internal fixation, removing bone fragments which constituted the lower portion of her patella. He also reattached the patella tendon, which had ruptured as a result of the accident. In order to reattach the tendon, the doctor had to drill a hole in plaintiff's bone. The operative note reflects, *inter alia*, that the fracture was "significantly comminuted" and that "the articular surface of the inferior pole was four or five fragments." The operation left her with a six inch scar on her knee.

After surgery, a knee immobilizer was applied. According to plaintiff, this caused her chronic problems due to the condition of the area below her knee (which was a result of the polio). Plaintiff was incapacitated from May 2002 through August 2002, including an eight week period after the surgery during which she was unable to bathe and during which plaintiff's husband took care of plaintiff. Additionally, plaintiff's husband testified that he carried out all of the tasks ordinally carried out by plaintiff well into mid September 2002. Plaintiff also underwent extensive physical therapy after the surgery and testified that she has continued to feel instability in her knee causing her to have trouble bending and squatting. Plaintiff's treating orthopedic surgeon confirmed at trial that the injury plaintiff sustained would cause plaintiff to have difficulty kneeling.

Plaintiff testified at trial that the problem she has in bending her knee has affected her sex life with her husband as she already had been forced to make certain accommodations as a result of the polio. Plaintiff also testified that the further residuals from the injury have affected her ability to hike and go bird watching with her husband, activities she greatly enjoyed which she participated in on a regular basis, and has prevented her from serving in the capacity as a lector in her church due to her inability to stand for long periods of time. In describing her pain, plaintiff was able, in great detail, to describe the difference in the pain she experiences due to her polio and the pain she experiences due to the injury to her right patella caused by the accident.

Except for plaintiff's complaints of pain and the testimony concerning her limitations of activities due to the injury, none of the facts referred to above were controverted at trial. The only contrary evidence presented by defendant was the testimony of their examining doctor who testified, based on his examination of the plaintiff, that plaintiff had a full range of motion in her right knee when he examined her and that in his opinion plaintiff had returned to her full pre-accident condition. This same doctor testified he found no reason for plaintiff's current complaints of pain in her right knee other than the pain or discomfort she may feel due to the surgical scar. Defendant's doctor attested, however, to the fact that he found decreased sensation on the inside of plaintiff's right knee and further stated that plaintiff's injury was permanent. While plaintiff claimed that since the accident and as a result of the accident, she occasionally uses crutches for support, no expert opined that there was a casual relationship between plaintiff's current use of crutches and her injury to the knee.

Based on all the evidence presented at trial, the Court is unable to conclude, pursuant to CPLR § 4404(a), that the jury's verdict as to damages was either contrary to a fair interpretation of the evidence nor that it was contrary to the weight of the evidence. Thus defendant has not met its burden pursuant to CPLR § 4404(a).

The Court now turns to an analysis of defendant's claims pursuant to CPLR § 5501(c), whether the jury's award materially deviated from what would be reasonable compensation. A review of a damage award pursuant to CPLR § 5501() involves a numerical comparison of awards in similar cases. (*Donlon v. City of New York*, 284 AD2d 13 [1st Dept 2001]; *Weigel v. Quincy Specialties Co.*, 190 Misc2d 1[Sup. Ct. NY County 2001]; *Lyerly v. Madison Square*

Garden, supra). CPLR §5501©, provides, in pertinent part:

> In reviewing a money judgment in an action in which an itemized verdict is required ... in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

While CPLR § 5501 (c) expressly refers to review by the "appellate division," the Appellate Division Third Department has stated "the same standard has been held to apply to the trial court." (*Wendell v. Supermarkets General* Corp., 189 AD2d 1063, 1064 [3rd Dept. 1993], *citing,* Shurgan *v. Tedesco*, 179 AD2d 805, 806 [2nd Dept. 1992]).[2] In reviewing awards pursuant to CPLR § 5501(c), the courts consider such factors as the type of injury, the level of pain, the age of the plaintiff, and the period of time for which the pain is being calculated. (*Garcia v. Queens Surface Corp.*, 271 AD2d 277 [1st Dept 2000]; *Staerczewski v. City of New York*, NYLJ Aug. 5, 2002 at 20 col 6 [Sup Ct Bronx County]). In order to set aside a jury's verdict on pain and suffering pursuant to CPLR § 5501(c), defendant has the burden of demonstrating that the award "materially deviated ,from what would be reasonable compensation."

In the instant case, both sides submitted cases they believe to support their positions in this regard. In *Salop v. City of New York*, 246 AD2d 305 (1st Dept 1998), the plaintiff had the same injury and the same surgical repair as plaintiff in the instant case; the only difference was that in *Salop*, the plaintiff was found to have atrophy which was expected to worsen over time. In that case the First Department found that the award of two hundred thirty thousand dollars for past pain and suffering and four hundred and ninety thousand dollars for future pain and suffering did not deviate materially from what is reasonable compensation. In *Osario v. Marlo Equities,* 255 AD2d 132 (1st Dept 1998), a sixty one year old man suffered a comminuted fracture of his right patella, had orthoscopic surgery to repair the fracture, was casted from ankle to the groin for a month and a half, was put on crutches for six months, had thirty sessions of physical

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[2] A review of *Shurgan* reveals that this may not be an accurate reading of *Shurgan's* holding, but that discussion will have to await a law journal article or clarification by a higher court.

therapy, and it was opined at trial that he may need a second orthoscopic surgery and eventually total knee replacement. In that case the First Department held that it would set aside a past damages award of $50,000, a future damages award of 0, and a loss of consortium award of 0, unless the defendant stipulated to an award of $317,500 for past pain and suffering, $500,000 for future pain and suffering, and a $50,000 for loss of consortium. In *Bridges v. City of New York*, 18 AD3d 258 (1st Dept. 2005), the First Department sought additure from $60,000 to $300,000 for past pain and suffering and from 0 to $50,000 for future pain and suffering in a case involving a fractured knee, three days of hospitalization, two surgeries, one for open reduction internal fixation, the second for removal of the hardware, a four inch surgical scar, and six weeks of incapacitation after the surgery. In *Gainey v. City of New York*, 278 AD2d 102 (1st Dept.2000), the First Department upheld an award for $300,000 for past pain and suffering and $300,000 for future pain and suffering for an injury resulting in a ruptured muscle and a ruptured quadriceps tendon requiring eight days of hospitalization, lengthy recovery, many months in a cast, and a lot of pain leaving plaintiff in a progressive and debilitated condition. In *Alvardo v. City of New York*, 287 AD2d 298 (1st Dept 2002), the First Department sought to reduce the jury's verdict from $900,000 to $250,000 for past pain and suffering and from $400,000 to $150,000 for future pain and suffering where the plaintiff fractured her right patella and was subject to eight days of hospitalization for the first surgery and two more days of hospitalization for the second surgery. In *Hoerner v. Chrysler Financial Co., LLC.*, 21 AD3d 1254 (4th Dept 2005), the Fourth Department reduced the award from $375,000 to $250,000 for past pain and suffering, and from $1,000,000 to $250,000 for future pain and suffering, and from $100,000 to $25,000 for future loss of consortium where plaintiff fractured his patella, plaintiff was not totally disabled, was able to walk without a limp, has a functional but imperfect patella, but may need surgery in the future.

Among the cases provided by defendant were cases found in the verdict reporter. The most recent cases whose facts are similar to the instant case are *Cunningham v. Q*, Bronx County 2005, where the jury awarded plaintiff $200,000 for past pain and suffering and $270,000 for future pain and suffering where the injury was the same, but plaintiff had a second surgery to remove the hardware and a loss of range of motion in plaintiff's knee; and *Perez v. New York*

City, Bronx County 2002, where the jury awarded the plaintiff $1,000,000 for past pain and suffering and $1,5000,000 for future pain and suffering for the same injury, repair by orthoscopic surgery but where the injury was found to be progressive and could require surgery in the future.

A comparison of the jury verdicts in these other cases to the jury verdict in the instant case shows that the jury's award on damages in the case before the Court did not materially deviate from reasonable compensation. The portion of defendant's motion seeking the Court to set the post judgment interest rate at less the 9% is denied as defendant fails to attach any support for its claims in an admissible form. An affirmation by defendant's attorney that the 9% statutory interest rate "would grossly over compensate plaintiff because plaintiff could not have invested in a secure investment as of the date of the verdict and obtained a 9% return", is unsupported by admissible evidence. The Court, however, grants the portion of defendant's motion seeking to stay entry of judgment until the collateral source hearing is held. Accordingly, it is

ORDERED that defendant's motion to set aside the verdict as to past and future pain and suffering and past loss of consortium is denied; it is further

ORDERED that the parties appear for a collateral source hearing on Thursday, March 6, 2008 at 2:15 pm in Courtroom 280 at 80 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

Dated: February 6, 2008
New York, New York

KAREN S. SMITH, J.S.C.